

### **REMARKS**

Claims 1-18 and 22-25 are currently pending in the application. Claim 23 was amended. Support for amended claim 23 can be found variously throughout the specification, for example at paragraphs [0024] and [0033] of the instant published patent application No. 2005/0082616. This amendment was not made to overcome any art rejection. No new matter has been added. Reconsideration of the rejected claims in view of the following remarks is respectfully requested.

#### ***Allowable Claims***

Applicants appreciate the indication that claim 7 is allowed. Furthermore, Applicants submit that all of the claims are in condition for allowance for the following reasons.

#### ***Objection to Specification***

Claim 23 was objected to allegedly for lack of antecedent basis. By this Amendment, claim 23 was amended to recite that the material used to form the layer has a different lattice constant than the substrate prior to formation of the layer. This amendment was not made to overcome any art of record. Withdrawal of this objection is requested.

#### ***35 U.S.C. §102 Rejections***

##### **Over Ko**

Claims 1-3, 6, 9-15, 17, 18 and 22-25 were rejected under 35 U.S.C. §102(e)

over US Patent Publication No. 2005/0035470 to Ko et al. The rejection is respectfully traversed.

Applicants submit that this basis of rejection is improper at least because Ko is not prior art. As the Examiner knows, Applicants have established, by Rule 1.131 Declaration, an effective filing date in a previous response of at least June 17, 2003. On the other hand, Ko was filed in the US on August 12, 2003, i.e., after June 17, 2003. Thus, regardless of what Ko discloses, teaches or suggests, Ko does not qualify as prior art under 35 U.S.C. § 102 and the instant rejection is therefore improper.

Still further, in accordance with the MPEP Section 707.07(f), the Office Action has not responded in such a manner as to object to or contradict the Rule 131 Declaration, and therefore, the facts presented in the Declaration are controlling, and the arguments presented in the previous Response is accepted at face value. Accordingly, the Office Action de facto accepts that Ko is not a qualified reference. See *In Re Soni*, 54 F.3d 746, 751, 34 USPQ2d 1684, 1688 (Fed. Cir. 1995) (Office failed to rebut applicant's argument).

Accordingly, Applicants respectfully request that the above-noted §102(e) rejection of claims 1-3, 6, 9-15, 17, 18 and 22-25 be withdrawn.

#### Over Chen

Claims 1 and 10 were rejected under 35 U.S.C. §102(e) over US Patent Publication No. 2005/0051851 to Chen et al. The rejection is respectfully traversed.

Applicants submit that this basis of rejection is improper at least because Chen et al. '851 is not prior art. As the Examiner knows, Applicants have established, by Rule

1.131 Declaration, an effective filing date in a previous response of at least June 17, 2003. On the other hand, Chen et al. '851 was filed in the US on September 10, 2003, i.e., after June 17, 2003. Thus, regardless of what Chen et al. '851 discloses, teaches or suggests, Chen et al. '851 does not qualify as prior art under 35 U.S.C. § 102 and the instant rejection is therefore improper.

Still further, in accordance with the MPEP, the Office Action has not responded in such a manner as to object to or contradict the Rule 131 Declaration, and therefore, the facts presented in the Declaration are controlling. Accordingly, the Office Action de facto accepts that Chen et al. '851 is not a qualified reference.

Accordingly, Applicants respectfully request that the above-noted §102(e) rejection of claims 1 and 10 be withdrawn.

Applicants note that the Office Action contains a footnote No. 3 related to this rejection. As this is not a formal statement of rejection, Applicants are uncertain as to the purpose of this footnote, and accordingly need not be addressed this at this time.

### ***35 U.S.C. §103 Rejections***

#### ***Over Ko alone***

Claims 5, 8 and 16 were rejected under 35 U.S.C. §103(a) over US Patent Application Publication No. 2005/0035470 to Ko et al. The rejection is respectfully traversed.

As stated previously, Applicants submit that this basis of rejection is improper at least because Ko is not prior art. As the Examiner knows, Applicants have established,

by Rule 1.131 Declaration, an effective filing date in the previous response of at least June 17, 2003. On the other hand, Ko was filed in the US on August 12, 2003, i.e., after June 17, 2003. Thus, regardless of what Ko discloses or suggests, Ko does not qualify as prior art under 35 U.S.C. § 102 and the instant rejection is therefore improper. See *In Re Soni*, 54 F.3d 746, 751, 34 USPQ2d 1684, 1688 (Fed. Cir. 1995) (Office failed to rebut applicant's argument).

Accordingly, Applicants respectfully request that the above-noted §103(a) rejection of claims 5, 8 and 16 be withdrawn.

*Over Ko with Hoffman*

Claim 4 was rejected under 35 U.S.C. §103(a) over US Patent Application Publication No. 2005/0035470 to Ko et al. in view of US Patent Application Publication No. 2004/0253776 to Hoffman et al. The rejection is respectfully traversed.

As stated previously, Applicants submit that this basis of rejection is improper at least because Ko is not prior art. As the Examiner knows, Applicants have established, by Rule 1.131 Declaration, an effective filing date in the previous response of at least June 17, 2003. On the other hand, Ko was filed in the US on August 12, 2003, i.e., after June 17, 2003. Thus, regardless of what Ko and Hoffman discloses or suggests, Ko does not qualify as prior art under 35 U.S.C. § 102 and the instant rejection is therefore improper.

Accordingly, Applicants respectfully request that the above-noted §103(a) rejection of claim 4 be withdrawn.

**CONCLUSION**

In view of the foregoing amendments and remarks, Applicants submit that all of the claims are patentably distinct from the prior art of record and are in condition for allowance. The Examiner is respectfully requested to pass the above application to issue. The Examiner is invited to contact the undersigned at the telephone number listed below, if needed. Applicants hereby make a written conditional petition for extension of time, if required. Please charge any deficiencies in fees and credit any overpayment of fees to Deposit Account No. 09-0458.

Respectfully submitted,  
Haujie CHEN, *et al.*

A handwritten signature in black ink, appearing to read 'Andrew M. Calderon', written over a horizontal dashed line.

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